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No. 08-327

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In The Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; CHARLES L. RYAN, Director Of The Arizona Department Of Corrections,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

After the Petition for Certiorari was filed, Charles L. Ryan replaced Dora Schriro as Director of the Arizona Department of Corrections. The other parties remain the same.

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ARGUMENT

The District Court's main theme in opposing certiorari seems to be that the super-disclosure reports that it requires Arizona prison officials to provide in certain inmates' cases are helpful to the court. But their utility to the court does not legitimize them. The issue is whether the court had lawful authority to force state executive-branch officials – who are not even parties to the suit – to stop performing the responsibility that Arizona law imposes on them, in order to act as investigators for a federal court, looking into allegations made by prison inmates, a group known to often use litigation for recreation instead of legitimate means. The District Court accuses the Petitioners of misleading this Court (which it fails to prove), but it fails to show how it has the power to draft non-party Arizona prison officials into service as its own investigative service.

I. The Court Should Grant Certiorari to Reassert Its Authority and Supremacy in Promulgating Federal Rules of Procedure.

As the Petitioners pointed out, this Court has, with Congressional approval, decreed that disclosure statements shall not be required in civil suits brought by inmates representing themselves. Fed. R. Civ. P. 26(a)(1)(E)(iv). The District Court asserts that its super-disclosure orders do not violate that edict because the required reports, unlike typical disclosure statements, must be attested and filed with the judge, and the judge uses them as a case-management tool.

(Resp. at 17.) Essentially, the District Court's position is that it can ignore this Court's edict in Rule 26(a)(1)(E)(iv) by tweaking the details and requiring a statement that is, in some respects, *more onerous* than a Rule 26 disclosure statement would be. That is an unlikely interpretation of Rule 26(a)(1)(E)(iv) and does not even begin to address the unfairness inherent in imposing this super-disclosure requirement unilaterally. If this Court had intended to grant the district courts the extraordinary power to unilaterally require the defense – and associated non-parties – to go beyond Rule 26's requirements, it likely would have expressed this intent explicitly, rather than leaving it to be discerned by negative implication.

The District Court looks in vain to Rule 16 to support its super-disclosure statements. Rule 16 is a timing rule. It does not establish or authorize any procedures for conducting litigation. Rather, it requires the district courts to establish schedules for procedures established by other rules. Thus, the fact that scheduling orders may "include other appropriate matters" does not give the district courts carte blanche to create new procedures. The option of including other appropriate matters in a scheduling order simply does not authorize a court to unilaterally require one side to disclose things to the other side, does not allow the court to co-opt the resources of a state government's executive branch, and does not allow the court to impose requirements

against officials over whom it lacks jurisdiction. The District Court asks far too much of this rule.

II. The Court Should Grant Certiorari to Clarify the Role of Administrative Exhaustion Under the Prison Litigation Reform Act.

The District Court misstates the Petitioners' arguments concerning the PLRA. Contrary to the District Court's assertions (Resp. at 19-20), the Petitioners did not argue that the super-disclosure orders hinder or bar them from seeking dismissal based on the inmates' failure to exhaust their administrative remedies. Rather, they noted the super-disclosure orders' inconsistency with the PLRA: the super-disclosure order requires prison officials to conduct an investigation of the inmates' claims even though the inmate might have forfeited that opportunity by not properly pursuing a prison grievance.

Although prison officials could avoid that result by filing an early motion to dismiss raising the inmates' failure to exhaust, the District Court lacks the authority to require it. The District Court articulates no reason why inmates' lawsuits should require defendant prison officials to so quickly garner their resources – and the resources of their superiors and institutions – to file the dispositive motion. The mere fact that by doing so they could avoid doing an investigation that the inmate has already forfeited

does not give the District Court authority to make them do so.[1]

III. The Court Should Grant Certiorari to Establish the Limits of the District Courts' Powers Under the Separation of Powers and Principles of Federalism.

The super-disclosure order crosses both the line separating the federal from the state governments and the line separating the judicial from the executive branch. The District Court cites no authority allowing such a usurpation of the resources of Arizona's Department of Corrections (ADC). It thus tacitly concedes that there is no authority for it to co-opt the services of a different branch of a different level of government.

The District Court's first argument is unconvincing. It asserts that adopting the Petitioners'

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[1] The District Court accuses ADC of having bungled Tuzon's administrative grievances, and it insinuates that this supports the issuance of the Order at issue here. (Resp. at 12 [citing *In re Arizona*, 528 F.3d 652 (9th Cir. 2008)]; *id.* at 20.) Even if ADC were responsible for the mix-up, this accusation is out of place because it was not the reason why the District Court issued the super-disclosure order. The super-disclosure order was issued on October 30, 2006 (Pet. App. D), long before the District Court addressed the grievance mix-up, which it did on July 7, 2007 (Dkt. 76). And the mix-up in Tuzon's case could not possibly justify the District Court in entering substantially the same order in other cases.

position would mean that "each time a state governmental entity is a party to litigation, federalism and separation of powers principals would render the district court powerless to issue any number of case management and discovery orders." (Resp. at 15.) This ignores the salient fact: neither ADC nor the State of Arizona is a party to the case. And even if they were, this would only give the court the power to enter *appropriate* case-management and discovery orders, ones that are neutral and bilateral. The Order at issue here is neither neutral nor bilateral, and it is not appropriate. It improperly co-opts ADC into the court's investigative arm for Tuzon's and other inmates' lawsuits.

The District Court also relies on cases where this Court has approved orders entered against state prison officials, and by extension, state prisons: *Lewis v. Casey*, 518 U.S. 343 (1996), and *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled on other grounds by Lewis v. Casey*. Rather than supporting the court's argument, these cases illustrate the Petitioners' position. In both, the courts entered orders granting injunctive relief that were appropriate because the plaintiffs had proven the alleged constitutional violations. In neither case did the court co-opt state prison officials into a judicial investigative role. In neither did the court require prison officials to, at taxpayer expense, investigate the plaintiffs' cases for them and report back to them. These cases simply do not support the District Court.

The District Court asserts that, in contrast to the injunctions in *Lewis* and *Procunier*, its super-disclosure "is not a judgment, provides no injunctive relief and cannot be characterized as interfering with daily prison operations and regulations of the kind discussed in *Procunier* and *Lewis*." (Resp. at 16.) Whatever truth there is in that statement is irrelevant. A court's order requiring certain people to do certain things under pain of contempt is just as onerous whether called a "scheduling order" or a "judgment." While the super-disclosure order might not be *called* an injunction, it does grant some injunctive-type prospective relief to Tuzon by forcing prison officials to investigate his allegations and provide him a verified report. *Cf.* 18 U.S.C. § 3626(g)(7) (defining "prospective relief"); *In re Arizona*, 528 F.3d at 658 (acknowledging that the super-disclosure order constitutes prospective relief).

Both the District Court and the Ninth Circuit refuse to acknowledge that the super-disclosure order interferes with Arizona prison officials in the performance of their statutory duties to run the state prisons. (Resp. at 16; *In re Arizona*, 528 F.3d at 658 [refusing to even consider the interference].) That interference is clear on the face of the Order, which is specifically directed at "Defendants *or officials responsible for the operation of the appropriate institution*" and requires them "to undertake a **review** of the subject matter of the Complaint." (Pet. at 1b-2b [italics added].) Neither the District Court nor the Ninth Circuit offers any explanation for how this

review could be carried out and the report produced without requiring prison officials to divert resources away from the day-to-day operations of the prisons. ADC does not have such a surfeit of resources and manpower that it can comply with the District Court's super-disclosure orders without taking prison officials and employees away from their day-to-day duties. Federal-court interference with the running of state prisons is manifest in the Order, even if the lower courts refuse to acknowledge it.

IV. The Court Should Grant Certiorari to Give Guidance to the Lower Courts to Protect the Due-Process Rights of Parties and Non-Parties.

The District Court misstates the Petitioners' position on the due-process implications of its super-disclosure order. Contrary to the court's assertion, the Petitioners' do not assert that they have a liberty interest in the Federal Rules of Civil Procedure. Their two-part argument is much more basic. First, courts must have personal jurisdiction over persons against whom they purport to act. And second, even when they do have that jurisdiction, they must treat both sides fairly and neutrally. The super-disclosure orders fail in both respects.

A. The Court should address the due-process implications of the District Court's actions against non-parties.

A court's first responsibility in deciding whether to act is to determine whether it has jurisdiction – whether it has power to take the contemplated action. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). Part of this examination is whether the court has personal jurisdiction over the parties over whom it purports to act. *See Dennis Garberg & Assocs. v. Pack-Tech,* 115 F.3d 767, 771-72 (10th Cir. 1997) (before entering judgment against defaulting party, court must determine whether it has personal jurisdiction). Courts surely must conduct the inquiry if there is any reasonable doubt about their jurisdiction. *See Ashcroft v. Iqbal*, 556 U.S. ___, ___, No. 07-1015, slip op. at 6 (May 18, 2009) (courts must address their subject-matter jurisdiction whenever it is fairly in doubt).

The District Court ignores the fact that it has ordered non-parties – under penalty of contempt – to undertake the mandated judicial investigation. It accuses the Petitioners of "ignor[ing] the everyday realities of modern litigation" when "an entity is a party to civil litigation." (Resp. at 18.) The District Court goes on: "It is axiomatic that when a business is sued for anything from employment discrimination to patent infringement, non-parties such as human resources representatives and engineers must assist in preparing documents and responses to any number of litigation-related items." (*Id.* at 18-19.) This

statement is true: when a principal is sued, its agents may be required to take actions to fulfill the principal's litigation responsibilities. After all, a corporate entity can only act through its agents. But the District Court persistently ignores the fact that the entity, the Arizona Department of Corrections, is *not* a party to this litigation. The Defendants are agents of ADC, not vice-versa. Water flows downstream, not up. The District Court cites no authority supporting the notion that hauling an agent into court effectively brings in the agent's principal. It cites no authority giving it the power to co-opt non-parties to undertake a judicial investigation of cases before it.

"Personal jurisdiction . . . 'represents a restriction on judicial power . . . as a matter of individual liberty.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). "The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause." *Id.* (quoting *Ins. Corp. of Ireland*, 456 U.S. at 702). The super-disclosure orders violate the due-process rights of the non-party institutions and persons to whom the district court purports to apply them.

B. The Court should address the due-process implications of the District Court's failure to be fair and neutral.

The District Court also ignores the unfairness of its super-disclosure orders. American courts are

adversarial, not inquisitional. The judge sits as a neutral arbiter, favoring neither one side nor the other. "[T]he Due Process Clause entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955).

The super-disclosure orders require the defense (and associated non-parties) to investigate, report, and take possible action on behalf of the court. The orders require absolutely nothing of the inmate-plaintiffs. Even if some rule allowed courts to mandate investigations of the type at issue here, they would have to impose *mutual* obligations.

Courts generally allow the parties themselves to investigate and prove their respective cases. They do not provide one side free assistance in investigating and proving their case, and they certainly do not do so at the opposing party's expense, both financially and in manpower. This is fair and neutral. It is part of the American adversarial system of justice. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (contrasting adversarial versus inquisitorial systems). If Tuzon had sued a business corporation, it is hard to conceive of the District Court ordering the corporation to investigate his claims and prepare a report for the court and Tuzon to use. The State of Arizona and its Department of Corrections are entitled to the same respect.

The District Court asserts that it issues the super-disclosure orders in cases involving ongoing medical issues, which it uses to determine whether the "prisoner is at risk of physical harm that could be prevented or alleviated by judicial intervention." (Resp. at 8.) This does not justify the super-disclosure order, certainly not in this case. Tuzon's only claims that might qualify were the allegation that Defendant Taylor had denied him food while he was on detention status (Dkt. 76 at 2), and that Defendant Chenail had denied him prescription eyeglasses (*id.* at 3). The former was not an ongoing violation – Tuzon did not allege that he was currently being denied food – and the latter could hardly be deemed as putting Tuzon at risk of physical harm. Furthermore, the court did not limit its super-disclosure order to the medical issues; it ordered the defense to investigate and report on *all* of Tuzon's non-dismissed claims.

Tuzon did not allege that he was in any present danger of physical harm. (Dkt. 16, passim.) The District Court does not explain why it should – in the limited class of cases in which it says it issues these orders (Resp. at 6-8) – reach out to search for claims of possible physical harm against inmates when the inmates themselves have not alleged continuing physical danger. Inmates can surely be expected to bring such matters to the court's attention. The District Court does not have the authority to order ADC to perform the inmates' investigations for them.

V. This Is an Important Issue that the Court Should Not Ignore.

The District Court's efforts to downplay the importance of the issues presented here are unconvincing. As the District Court notes, it has recently averaged five of these super-disclosure orders per year. (Resp. at 9-10.) Its Response suggests that it plans to continue issuing them. It promises, in essence, to continue to violate the rights of the Petitioners and associated prison personnel, and will do so some *fifty* times over the next ten years, assuming that the historic rate holds true. That is hardly insignificant.

Similarly, the fact that there is no circuit split on this and similar[2] issues is no reason for the Court to ignore the problem. Rather, cases like *Martinez* show that the problem is more widespread than the District Court would have it. In any event, the lack of a circuit split does not mean that there is no need for this Court to clarify the law. *Cf. Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, ___, No. 08-22 slip op. at 39 (June 8, 2009) (Scalia, J., dissenting) ("The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law.").

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[2] The so-called *Martinez* reports perform a different function than the super-disclosure report at issue here. The district courts that order *Martinez* reports turn prison officials into their judicial investigators to provide information that the latter use "to enable the trial court to decide the jurisdictional issues and make a determination under [the screening provision of the PLRA]." *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978).

That the Ninth Circuit has chosen to overlook the District Court's violations of the Petitioners' rights should not persuade this Court to do the same. As overseer of the federal judiciary, this Court should clarify the limits on the lower courts' ability to issue scheduling orders that conflict with the Federal Rules of Civil Procedure, the PLRA, and the Constitution.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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